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No. 83-1931

In the Supreme Court of the United States

OCTOBER TERM, 1984

DEIL OTTO GUSTAFSON, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether the district court abused its discretion in admitting evidence of prior similar conduct to establish petitioner's knowledge and intent pursuant to Rule 404(b) of the Federal Rules of Evidence.

2. Whether the district court improperly declined to rule in advance on petitioner's motion in limine respecting the scope of cross-examination of a potential defense witness.

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OPINION BELOW

The opinion of the court of appeals (Pet. App. B1-B13) is reported at 728 F.2d 1078.

JURISDICTION

The judgment of the court of appeals was entered on February 29, 1984. A petition for rehearing was denied on March 30, 1984 (Pet. App. C1). The petition for a writ of certiorari was filed on May 15, 1984. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Following a jury trial in the United States District Court for the District of Minnesota, petitioner was convicted on 24 counts charging conspiracy, misapplication of bank funds, mail fraud and wire fraud, in violation of 18 U.S.C. 371, 656, 1341 and 1343, and sentenced to a total of ten

years' imprisonment and a fine of $81,000. The court of appeals affirmed (Pet. App. B1-B13).

The evidence at trial, the sufficiency of which is not in dispute, showed that petitioner and his co-conspirators engaged in an elaborate check-floating scheme during 1977 and 1978 in order to obtain the use of funds from several banks owned or controlled by petitioner. The funds were used to improve the cash-flow situation of a Las Vegas hotel in which petitioner had an interest and an entertainment firm owned by a co-conspirator, enabling those businesses to meet their payrolls and to avoid being closed by the Internal Revenue Service. Pet. App. B3-B4.

The businesses maintained checking accounts and depository accounts for federal withholding taxes at petitioner's banks. They regularly deposited into these accounts checks that were not backed by sufficient funds. Petitioner's banks treated these checks as collected items and permitted the corporations to draw upon them to meet their obligations. When the checks were returned as dishonored, petitioner's banks would accept new checks, again not backed by sufficient funds, to replace them. These too were treated as collected items, starting the cycle anew. The corporations thus relied on the "float" period between the time the checks were deposited and the time they were dishonored to obtain the use of the money without paying interest. Bank officials made false entries on the books of the banks in order to conceal the scheme from bank examiners. Pet. App. B3-B4. The total amount of money involved was substantial, with over $4.3 million in float at one time (4 Tr. 106-107; Gov't Exh. 389).

Petitioner was closely involved in this scheme. He opened certain of the accounts and was aware of the number, frequency and total dollar amount of the bounced checks (2 Tr. 36; 3 Tr. 14; 6 Tr. 18, 183; 7 Tr. 87, 96-99, 102-105,

190-192, 198, 202-207; 9 Tr. 78-79, 113-114). When his banks' correspondent bank refused to extend further credit because of the magnitude of the float, petitioner was involved in an attempt to shift the scheme to a different bank and instructed a co-conspirator to lie to the Federal Bureau of Investigation about the matter (Pet. App. B6). On the same day that federal bank examiners entered two of petitioner's banks to audit the float, he persuaded two businessmen to borrow $1.5 million from a Minnesota bank for him, and he used this money to pay off all but $361,000 of the outstanding float (*id.* at B6-B7).

ARGUMENT

1. Petitioner first contends (Pet. 12-20) that the district court abused its discretion in permitting the introduction of evidence of other crimes, pursuant to Rule 404(b) of the Federal Rules of Evidence, to establish his knowledge and intent. The court of appeals correctly determined (Pet. App. B7-B11) that admission of the evidence was proper. Review of petitioner's fact-bound claim is unwarranted.

The evidence at issue related to petitioner's involvement in a 1975 check-floating scheme concerning Marlee, Inc., another corporation owned by petitioner. Marlee opened a checking account at one of petitioner's banks by depositing a personal check for $300,000 written by Ed Legg. The bank treated the check as collected, and permitted Marlee to withdraw $169,000 on the funds before Legg stopped payment on the check. To cover the overdraft, petitioner deposited a check for $300,000 drawn on an Ethiopian bank into Marlee's account. This check was also treated as collected, and Marlee withdrew an additional $65,000 on these funds. Two months later, the Ethiopian check was still uncollected. Petitioner assured the bank's board of directors that he would cover any overdraft and subsequently did so. After petitioner's bank was examined in December 1975, Chief Federal Reserve Bank Examiner Fogel wrote a letter

(Gov't Exh. 500) to the board of directors characterizing the transaction as a "direct misapplication of bank funds" with attendant "fictitious entries" on the bank's books. The letter named petitioner as one of the parties responsible for the transaction. Pet. App. B4-B5.

a. Petitioner claims that the letter was not admissible under Rule 404(b) because it was not relevant (Pet. 18-20) and because the district court did not make explicit findings on the record concerning its admissibility (Pet. 15-18). The evidence was clearly relevant to petitioner's intent and knowledge. The Marlee scheme demonstrated that petitioner well knew how to manipulate the float in order to kite checks, and the letter cast serious doubt on his defense that he did not know of or intend the float-manipulation activities charged in the indictment. See, *e.g.*, *United States* v. *Foley*, 683 F.2d 273, 278-279 (8th Cir.), cert. denied, 459 U.S. 1043 (1982). Under the balancing approach adopted by the Eighth Circuit, which petitioner does not contend is in conflict with that followed by the other courts of appeals (see Pet. 13-14), the district court acted well within its discretion by admitting the evidence for the limited purpose of establishing petitioner's knowledge and intent (Pet. App. B9-B10).

Petitioner argues (Pet. 18) that the evidence was not relevant because it was admitted during the government's direct case, before his defense was fully before the court. But petitioner put his intent in issue by his plea of not guilty. *E.g.*, *United States* v. *Russo*, 717 F.2d 545, 552 (11th Cir. 1983); *United States* v. *Wagoner*, 713 F.2d 1371, 1375 (8th Cir. 1983); *United States* v. *Roberts*, 619 F.2d 379, 383 (5th Cir. 1980). Moreover, in his opening statement petitioner set forth his defense that he exercised legitimate business judgment and did not carefully supervise his banking operations (1.1 Tr. 6, 11). Finally, even during the government's direct case it was clear that petitioner's defense focused on

his ignorance of any deliberate float-manipulation activities and his reliance on subordinates who were alleged to be responsible for the transactions without his knowledge (*e.g.*, 8 Tr. 134-139, 155, 157-158; 9 Tr. 104-107). Given these signals, it was perfectly reasonable for the court to anticipate petitioner's defense and admit the exhibit when it was offered. See, *e.g.*, *United States* v. *Hooten*, 662 F.2d 628, 635 (9th Cir. 1981), cert. denied, 455 U.S. 1004 (1982); *United States* v. *Burchinal*, 657 F.2d 985, 993 (8th Cir. 1981). In any event, petitioner's defense was in fact consistent with what was expected at the time the evidence was admitted (see Pet. 9).

b. Petitioner's contention (Pet. 15-18) that the district court failed to exercise its discretion is without merit. Although the court did not explicitly set forth the basis for its ruling, it was made well aware by counsel of the factors to be considered under Rules 404(b) and 403. The court's own repetition of these factors was surely not required. Moreover, the court's invitation to counsel to supply a limiting instruction and the careful limiting instructions that were in fact given (8 Tr. 97-98; 14 Tr. 153; 16 Tr. 115-116) demonstrated that the court had resolved the competing concerns relevant under the Rules. Especially where, as the court of appeals concluded (Pet. App. B10), the probative value of the evidence "substantially outweighed" the danger of unfair prejudice, nothing would now be gained by requiring the district court to make its finding explicit.[1]

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[1]Petitioner's reliance (Pet. 17) on *United States* v. *Levy*, 731 F.2d 997, 1002-1004 (2d Cir. 1984), is misplaced. In that case, the district court had determined that the proffered evidence was part of the same transaction charged in the indictment, not a separate crime admissible only under Rule 404(b). Accordingly, the court admitted the evidence without limitation of the purpose for which it could be considered and without determining whether it was admissible under Rule 404(b) and Rule 403. The court of appeals concluded that the evidence was within

2. Petitioner also contends (Pet. 21-26) that he was improperly denied an advance ruling on his motion in limine to limit cross-examination of a prospective defense witness. The court of appeals properly rejected this claim (Pet. App. B12-B13).

a. Apart from the charges in the instant case, petitioner was charged with co-defendant Louis Bacigalupo in a second indictment with conspiracy and failure to file currency transaction reports in connection with the payment of a lingering overdraft of $220,000 resulting from the check-kiting scheme. At the close of the government's case, the court acquitted Bacigalupo. In the present case, petitioner announced his intention to call Bacigalupo as a defense witness. The government informed the court that it would seek to cross-examine the witness about the pending charges in the second indictment. Bacigalupo's attorneys stated that he would assert his privilege against self-incrimination in response to such questions. Pet. App. B12.

Petitioner sought an advance ruling from the court restricting the proposed cross-examination on the ground that it would not be relevant or within the scope of what he intended to cover on direct examination of Bacigalupo (12

Rule 404(b) and found prejudicial error in the district court's failure to determine its admissibility on that basis, especially in light of the slender evidence of the defendant's guilt. Here, unlike in *Levy*, the district court did admit the evidence under Rule 404(b), a limiting instruction was given, and the substantive evidence of guilt was substantial.

Petitioner also suggests (Pet. 15-16) that the government withheld the bank examiner's letter before trial and that he was unfairly surprised at trial. In our brief to the court of appeals (at 41-42) and in an affidavit, we explained that the exhibit was available to petitioner for two years before trial and that the prosecutor had given notice over a year before trial of his intent to introduce evidence relating to the Marlee transaction. Moreover, petitioner did not object on the ground of surprise when the evidence was offered or otherwise contend before the district court that the document had been withheld.

Tr. 87). The court responded that it would allow cross-examination that was "reasonably related" to the direct testimony, but declined to rule definitively until it knew precisely what would be covered on direct (12 Tr. 86; see Pet. 22; Pet. App. B12). After it became clear during petitioner's own testimony that the overdraft would be relevant, petitioner rested without calling Bacigalupo. Petitioner's counsel explained that "it became even more obvious to me that such examination [into the facts surrounding the second indictment] would probably be permitted by the court" (14 Tr. 201).

b. As the court of appeals concluded (Pet. App. B12-B13), there was no error in the district court's refusal to rule more definitively on the motion in advance of the witness's testimony on direct. There is no requirement that a court rule on an in limine motion such as petitioner's.[2] See *New Jersey* v. *Portash*, 440 U.S. 450, 462 n.1 (Powell, J., concurring); *United States* v. *Luce*, 713 F.2d 1236, 1239-1240 (6th Cir. 1983) (citing cases), cert. granted, No. 83-912 (argued Oct. 3, 1984);[3] *United States* v. *York*, 722 F.2d 715 (11th Cir. 1984) (per curiam); *United States* v. *Rivers*, 693 F.2d 52, 53-54 (8th Cir. 1982); *United States* v. *Cook*, 608 F.2d 1175, 1186 (9th Cir. 1979) (en banc), cert. denied, 444 U.S. 1034 (1980); *Cook*, 608 F.2d at 1188 (Wallace, J.,

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[2]This Court denied certiorari last Term in a case raising substantially the same issue. *Bagbey* v. *United States*, No. 83-1012 (Mar. 26, 1984).

[3]There is no need to hold this petition pending the decision in *Luce*. The issue here is whether a district court is required to rule on an in limine motion. The question before the Court in *Luce* is whether, where the district court does rule on such a motion, that ruling is reviewable on appeal. Even if the Court were to decide that advance rulings are reviewable, it would by no means follow that the district courts lack discretion to decline to make those rulings. This Court denied certiorari in *Bagbey* (see note 2, *supra*) on the same day that it granted the petition in *Luce*.

concurring); *id.* at 1190 (Kennedy, J., concurring in part and dissenting in part); *United States* v. *Hickey*, 596 F.2d 1082 (1st Cir. 1979). Especially where, as here, the propriety of the proposed cross-examination depended critically on the nature of the direct examination,[4] it was not unreasonable for the district court to decline to rule definitively before actually hearing the witness's testimony on direct.

The only case of which we are aware holding that the failure to rule on an in limine motion was reversible error, *United States* v. *Burkhead*, 646 F.2d 1283 (8th Cir.), cert. denied, 454 U.S. 898 (1981), is inapposite, as the court below recognized (Pet. App. B12-B13). In *Burkhead*, the defendant sought a ruling precluding his impeachment by prior convictions on substantive counts charged in the same indictment as the conspiracy count on which he was then being tried. The court of appeals noted (646 F.2d at 1286) that "the district court generally has discretion to defer ruling on evidentiary issues until the evidence is actually offered for admission," but it concluded (*ibid.*) that "[u]nder the special circumstances of this case" the refusal to rule in advance was an abuse of discretion because the prior convictions were so clearly inadmissible and the refusal to rule so obviously prejudicial. The court below correctly distinguished its decision in *Burkhead* as an exception and noted (Pet. App. B13) that "the instant case is covered by the general rule" permitting district courts to

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[4]See Fed. R. Evid. 611(b). Contrary to petitioner's contention before this Court (Pet. 22-23), but as he recognized in the district court (see pages 6-7, *supra*), the cross-examination would have been substantively relevant, not limited to impeaching the witness's credibility. Moreover, the proposed cross-examination could not have been limited merely because the witness intended to assert his Fifth Amendment privilege. See *McGautha* v. *California*, 402 U.S. 183, 215 (1971); *United States* v. *Hearst*, 563 F.2d 1331, 1338-1341 (9th Cir.), cert. denied, 435 U.S. 1000 (1978).

decline to rule on advance motions. In any event, even if there were a conflict, it would be one for the Eighth Circuit, not this Court, to resolve. *Wisniewski* v. *United States*, 353 U.S. 901 (1957).

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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